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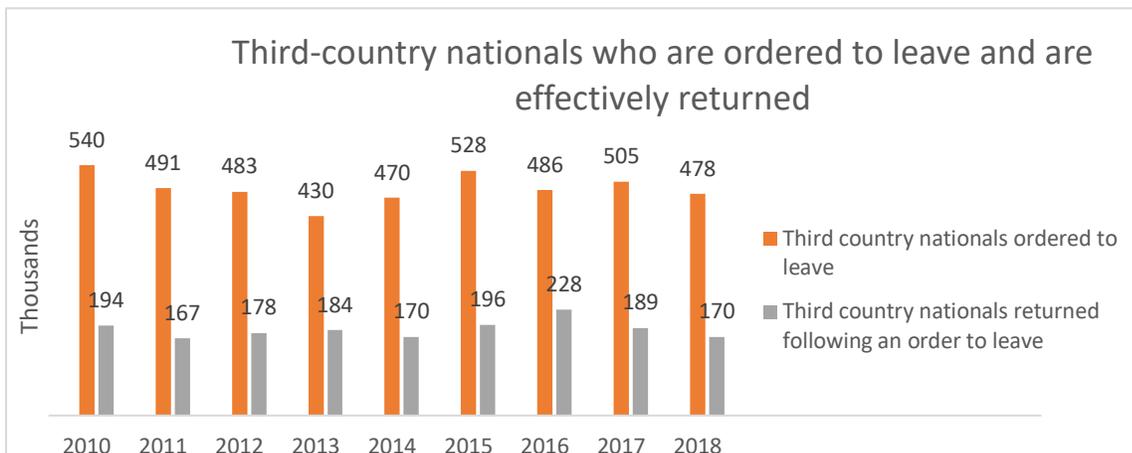
Impending clash over effective return of illegally staying migrants

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The EU needs to be more effective in returning third-country nationals who do not have the right to stay. Otherwise there can be no credible EU migration policy. The Commission’s proposal for a stricter regime raises important issues of practice and principle, and a clash is coming up between the European Parliament and the Council. The choices made will have important effects on returnees. They will also reflect the values that Europe wishes to project on the world stage.

Why is improving return rates such an issue?

Only 33-36% of those third-country nationals who are ordered to leave the EU following a decision that they have no right to stay are actually returned.



Data source [Eurostat](#)

Unless irregular migration is controlled it will be very difficult to maintain channels for legal migration and to ensure international protection for those in need. However, even though immigration authorities do issue return decisions, these are not adequately carried out and return rates remain dramatically low. In practice many of those ordered to leave the territory of the EU stay on and abscond, and eventually national authorities lose sight of them.

Why does this substantial gap exist?

Is it the result of difficulties encountered at the national level by the authorities charged with enforcing the decisions? Or should we look at potential inadequacies of the 2008 [Return Directive](#) which was intended to harmonize standards and procedures?

Ever since the first [evaluation](#) of the Return Directive in 2013, the European Commission has emphasized that the rate of returns can be improved through better enforcement and cooperation, issuing a [Communication](#) in 2014, followed by a [Recommendation](#), a [Return Handbook](#) and a [Renewed Action Plan](#) in 2017. A number of practical and operational measures had already been initiated to improve the enforcement of return decisions. Significant efforts to improve return rates were made in the wake of the 2015 migration crisis, with a focus on negotiating readmission agreements or other non-binding instruments with third countries.

What has the Commission proposed?

After years of pushing for better enforcement of the existing Return Directive, in 2018 the Commission took a dramatic U-turn and proposed new legislation to replace it. The Commission cited the Conclusions of the European Council of 28 June 2018 as the basis for this unforeseen move. However, no empirical evidence was provided either for assessing the impact and application of the existing Return Directive or for justifying the specific policy choices in the proposal. This was considered of such significance that the European Parliament, in a rare move, commissioned its [own impact assessment](#) to fill this lacuna and thus be able to give an evidence-based report on the proposal.

Judicial practice remedies EU return policy

This lack of evidence is especially striking because the Commission was proposing a markedly stricter regime. When the Return Directive had been adopted ten years earlier, it had been fiercely criticized by NGOs, academics and third countries for trampling over fundamental rights: it allowed considerable periods of detention to prepare for removal, and made entry bans mandatory for return decisions.

Yet most of these fears were alleviated by rulings of the Court of Justice of the European Union (CJEU) which ensured that interpretation of the Return Directive conformed to fundamental rights. The CJEU ruled that detention cannot go on for an unlimited time; ordinary criminal law cannot be applied to imprison irregular migrants; a limited right to a hearing was available for irregular migrants; and there is full observance of the *non-refoulement* principle (that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm). The CJEU's rulings were vigorously supported by the Commission in a 2014 Communication.

The new proposal reveals a more restrictive return policy

Then came the 2015-2016 migration crisis, which was a watershed in EU migration policy. It triggered a change of heart on the part of the European Commission, which now pushed for as strict an interpretation as possible of the Return Directive, within the case-law limitations in place. The **2018 proposal** provides for a much more restrictive return policy, including a new definition of 'risk of absconding', the obligation to cooperate, tighter rules for voluntary departure, the limited remedies (especially at border posts) and the non-exhaustive grounds for detention. All of these point towards making detention of irregularly remaining migrants the default setting, with a view to their rapid expulsion from the EU. These dramatic proposals were made without providing any assessment of whether it was the lax provisions of the existing law that resulted in low return rates and which therefore needed to be tightened.

Where is the legislative process heading?

The ball is now in the court of the European Parliament and the Council. It is quite telling that the Council, without much fuss, was able to agree a **partial general approach** on this matter in only half a year, whereas it made no comparable progress on any other asylum or migration dossier. Staying on the path paved by the Commission, the Council agreed to leave more freedom to the Member States to shorten periods of voluntary departure and to extend the maximum period of detention of returnees. The main point, however, was to widen the possible countries of destination to which third-country nationals can actually be sent back.

Proposed elements of a new return policy

According to the Commission's proposal, returnees could be sent to any other third country where they have a right to enter or which simply is willing to accept them. This is considerably broader than the current rule, which allows return to the country of origin, a third country of the returnee's choice that agrees to accept the returnee, or if nothing else, a country with which the EU has a readmission agreement. The Council's amendment would mean that the returnee could be sent to any country that is willing to take deported persons from the EU, irrespective of whether the returnee has ties or affiliation with that state, and without the guarantees that a readmission agreement may provide.

The Council also proposed an extension of the maximum duration of entry bans from five to ten years and several measures aiming to strengthen coordination between Member States for the purpose of issuing and implementing return decisions.

EP Rapporteur's draft report on the Return Directive

The European Parliament, however, has decided to take the matter into its own hands instead of taking the Commission's proposal at face value. On the basis of the new supporting analysis, the **draft report** published by the EP Rapporteur on 21 February 2020 takes the principle of voluntary return to be of paramount importance. In contrast to the Commission's proposal of limiting the exercise of voluntary return, it makes a bold case to further facilitate the voluntary departure and leaving of returnees. The draft report does not envisage any widening of the scope of countries to which a returnee could be returned and it specifically excludes those states with which the EU does not have a readmission agreement that provides a minimum level of guarantees.

The draft report also raises the threshold for determining the risk of absconding. In this version, the mere reason to believe that the returnee would abscond is not sufficient ground for national authorities to detain the returnee, and an individual assessment of risk must be made in each case.

Obligations or choices for the returnee?

Regarding the obligations of the returnee to cooperate with national authorities, the EP Rapporteur's point of departure is the complete opposite of that taken by the Commission and the Council. Instead of producing a long list of possible areas regarding which cooperation is demanded from the returnee, the Parliament assumes a sufficiently well-informed returnee, who can decide him or herself whether to take ownership of the return process.

The draft report also tackles the issue of elevating the European standards for detention, a subject left untouched in the Commission's proposal and overlooked by the Council, despite the mounting case law of the CJEU.

Entry bans for those who return voluntarily?

Finally, the Parliament's draft report rejects the imposition of an entry ban on those who have voluntarily returned from the EU. As already indicated, the Council not only agreed with this element of the Commission's proposal, but doubled the duration of such bans.

These examples illustrate quite starkly just how fundamentally different the approaches of the co-legislators, Council and Parliament, are towards remedying the problem of effectively returning third-country nationals who have no right to stay in the EU. The only point on which their positions currently seem to converge is the heightened sensitivity demonstrated to the treatment of children and other vulnerable groups.

Conclusions

The draft report of the European Parliament's Rapporteur stands in stark contrast to the measures that are being proposed by the Commission and endorsed by the Council. The clash of perspectives is expected to take place in the coming months, as the new legislative cycle gears up to make progress with the dossiers in the pipeline. The compromises that will be reached will clearly reveal which approach prevails: the more restrictive one focused on the detention and deportation of returnees, or the rights-based approach pushing for voluntary return and limiting the curtailment of personal freedom. The choices made will have important effects on returnees. They will also reflect the values that Europe wishes to project on the world stage.